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No. 01-210

In The

Supreme Court of the United States

SANDRA M. BRUFF,

Petitioner,

v.

NORTH MISSISSIPPI HEALTH SERVICES, INC.;
NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by this court's Rule 24(b) and Rule 29.1.

1. Sandra M. Bruff, Plaintiff/Petitioner;

2.. North Mississippi Health Services, Inc., Defendant/Respondent;

3. North Mississippi Medical Center, Inc., Defendant/Respondent.

North Mississippi Health Services, Inc. is the parent of North Mississippi Medical Center, Inc. They are both non-profit corporations.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . .

42 U.S.C. § 2000e(j):

> The term "religion" includes all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT OF THE CASE

The Fifth Circuit correctly applied the standards for review of a jury verdict under Title VII. Furthermore:

1. This is not an ordinary Title VII case. It is a religion case. The role of the jury in a religion case is restricted in a way its role in other Title VII cases is not.

The key statute, not quoted in the Petition but quoted above, is 42 U.S.C. § 2000e(j). That language, not found in race, gender, or age statutes, requires a finding concerning what is and what is not a "hardship" to an employer. Because the religious rights of plaintiffs cannot override the religious beliefs of others, this Court has construed

that term to require only a *"de minimis"* showing by the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1997). In that case, this Court treated this question as being a question of law and rendered judgment for the employer. This is not to say that there can never be a fact dispute on the *"de minimis"* issue, but simply to say that such disputes are relatively rare.

The Petition for Writ of Certiorari makes no mention of *Trans World*, or any other Title VII religious discrimination case. In fact, the petition is basically a warmed-over version of points on which petitioner's counsel did not prevail in an age discrimination case, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). Also, the first three questions presented were never raised in the Fifth Circuit.

2. Even as a religious case, this case is unusual. In most Title VII religion cases, the employer's business practices cater to the beliefs of religious majorities. Typically, the plaintiff belongs to a minority religion whose beliefs, such as holy days, conflict with those practices. In this case, the plaintiff's religious views – that homosexuality is a sin – are so predominant in her community that, in *voir dire*, the venire unanimously affirmed that they believed homosexuality is a sin. TT 9:21.

The defendants are a hospital and its parent corporation who had adopted a policy of non-discrimination based on "lifestyle." The hospital is open to everyone. It does not want a medically-needy segment of the population to stay away from the hospital because of a fear of discrimination. It is also aware that discrimination

against homosexuals can give rise to liability under various legal doctrines, including federal regulations and state tort law.[1] The hospital thus finds itself on one of the well-known tightropes created by Title VII. *See United Steelworkers v. Weber*, 443 U.S. 193, 210-11(1979) (Blackmun, J., concurring). The Court of Appeals properly found that the hospital had reasonably accommodated Bruff; to do more would risk further offense to its patients.

As the Court of Appeals accurately described, this case arose when the hospital was informed that counselor Bruff's statements had angered one of her patients because Bruff had expressed her religious opposition to the patient's homosexuality. App. 3. There is no genuine dispute about either what Bruff said or about the employer's report to the hospital. Bruff knows the identity of the patient and offered no evidence to dispute the hospital's report concerning the complaint.

The Fifth Circuit's decision stands for the commonsense proposition that a hospital has a right to enforce a policy against discrimination on the basis of lifestyle, particularly in cases in which a counselor has introduced her own personal religious beliefs into a counseling session and angered a patient who came to her for help. *See Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (hospital had

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[1] *See Blake v. Richardson*, 1999 WL 319082 at *2 (D. Kan. 1999) (construing Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §§ 1395dd); *Miller v. Spicer*, 822 F. Supp. 158, 168-69 (D. Del. 1993) (discrimination gave rise to liability for intentional infliction of emotional distress).

right to instruct even its religious counselors not to proselytize).

FACTS

The respondent hospital does not dispute the statement of facts contained in the Petition, except to the extent stated below. Neither of the two fact disputes petitioner claims are genuine disputes, and the case has an unusual procedural posture not mentioned by petitioner Bruff.

1. The Fifth Circuit correctly disregarded evidence that Bruff was ethically required to discriminate against homosexuals. App. 3 n.4. The evidence was legally irrelevant. The hospital admitted Bruff's religious beliefs were sincere and if her ethical beliefs coincided with her religious beliefs that does not change the case. The question was whether accommodating her beliefs would be an "undue hardship."

Nothing in the analysis calls *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), into question.

2. The Court of Appeals correctly found that Bruff's objections to counseling were inflexible. App. at 12 & n.13. There was no evidence upon which a reasonable jury could find differently.

There were no circumstances under which counselor Bruff said she would be willing to treat a person seeking assistance with a homosexual relationship, or in fact, any person in any activity that Bruff believed to be sinful or anti-social. TT 11:517-19, 11-523. Exs. D-24, D-51. It

demeans Bruff for her counsel to now suggest that she was willing to assist sin on some occasions.

On the other hand, the uniform testimony was that the preferences of other counselors were flexible, *i.e.*, they were willing to see a patient who needed to be seen if no one else was available to see the patient and the patient needed care:

a. As the Petition at 5 n.2 admits, Stella Yeldell said she did not like to counsel children, but never refused to see a child if necessary. TT 9:207-08.

b. There is no testimony that Sandra Holmes "did not like to counsel individuals who had lost family members due to cancer." Petition at 5 n.2. The only thing in the record on this point is a statement in a question by petitioner's counsel that suggested this might be the case. TT 11:605. In any event, there is no testimony that she ever refused such an assignment.

c. Finally, it is simply not true that counselor Bruff's Jewish replacement said she "would not counsel Neo-Nazis." Petition at 5 n.2. Ms. Rappaport testified that she would prefer not to counsel a Neo-Nazi, because of fear, not because of religion. But the issue never came up when she worked in the hospital's EAP and she never indicated that she would absolutely refuse to counsel such a person. PX-24, pp. 16-17, 22. The transcript pages 602-03 do not say anything to the contrary.

It is worth noting that Bruff counsel nevertheless repeated this untruth throughout the trial in a manner that ensured the jury would know Christian Bruff had a

Jewish replacement. The district court repeatedly sustained objections to these gratuitous remarks. TT 11:577, 11:594-57.

3. The unusual jury instructions created a peculiar procedural issue in this case. The Fifth Circuit addressed the two liability issues in the case, *i.e.*, i) whether keeping Bruff in the EAP would cause undue hardship to the hospital, and ii) whether the hospital's offer of accommodation was reasonable.

But the jury instructions did not require this. The jury interrogatories provided that the plaintiff lost on the whole case if she lost on *either* issue. *See* App. 24. By agreeing to that instruction, petitioner Bruff created a situation in which the Fifth Circuit could be half-wrong and she still would lose.

REASONS FOR DENYING THE WRIT

1. This Court in *Reeves* Considered Questions I, II and III and Rejected Petitioner's Arguments.

The questions presented in *Reeves* and answered by this Court dealt directly with the ability of a Court of Appeals to review a jury verdict, which are the same issues raised in questions I, II, III of the petition. In fact, some of the block quotes in the petition seem to have been reproduced, with slight alterations, from the Brief for Petitioners in *Reeves*.[2] Two of the questions presented there were:

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[2] *Compare* Petition for Writ of Certiorari at p. 16, 19 to Brief for Petitioners, *Reeves v. Sanderson Plumbing Products*, U.S. Sup. Ct. No. 99-563 (Jan. 7, 2000) at p. 46.

2. In determining whether to grant judgment as a matter of law under FED.R.CIV.P. 50, should a district judge weigh all of the evidence or consider only the evidence favoring the non-moving party?

3. Is the standard for granting judgment as a matter of law under FED.R.CIV.P. 56 the same as the standard for granting judgment as a matter of law under FED.R.CIV.P. 50?[3]

This Court answered the questions by saying i) the record must be taken as a whole and ii) that the standard for granting summary judgment mirrors the standard for judgment as a matter of law. 530 U.S. at 150. The Court also found any differences between the standard of review set forth in *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), and the standards used by other circuits to be "more semantic than real." *Id.*

This Court has thus recently and authoritatively decided the questions raised in the petition concerning the standards to be used in reviewing a jury verdict. It has i) stated the "limits . . . on an appeals court's authority to set side a jury verdict," ii) held that review of the district court decision is *de novo*, and iii) described the standard for distinguishing questions of law from questions of fact.

The petition ignores these holdings in *Reeves* and offers no reason why it should be reconsidered.

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[3] Brief of Petitioner, *Reeves v. Sanderson Plumbing Products*, U.S. Supreme Court, No. 99-563, Jan. 7, 2000, at p. i.

2. Petitioner Did Not Raise Questions I, II, Or III In The Court Of Appeals.

Despite knowledge of the issues that were being raised before this Court in *Reeves*, petitioner's counsel did not raise any of these issues in the Fifth Circuit. In fact, counselor Bruff's brief relied on *Boeing*[4] and it was the respondent hospital who relied on *Reeves* after it was decided.[5]

Even when counselor Bruff discussed *Reeves* in her Petition for Rehearing, she did not argue these points. Specifically, she:

1. Did not argue that *Reeves* was contrary to *Boeing*, or that the Seventh Amendment had bearing on this case.

2. Did not present any of the statistics found in App. 26-42. Respondent's counsel has no idea as to who prepared these statistics, or the guidelines that were used in preparing them, or their accuracy. They were never tested in a lower court and should not be passed upon here.

3. Did not challenge the ability of a Court of Appeals to review the judgment as a matter of law *de novo*.

4. Did not ask the Court to draw a new distinction between issues of law and issues of fact.

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[4] Brief for the Appellee – Cross-Appellant, p. 2.

[5] Reply Brief of Appellants and Brief of Cross-Appellees, p. 2.

A court of appeals should not be held to have erred based on arguments that were never presented to it. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

3. The Fifth Circuit Was Well Aware of *Reeves*.

As described above, the Fifth Circuit was well aware of the *Reeves* decision when it ruled on this case. There is no reason to entertain the petition's fourth question, which asks that the case be sent back to the Fifth Circuit so it can be done all over again.

Moreover, as shown above, the Fifth Circuit applied the acceptable *Boeing* standard and there are no genuine and material fact issues in this case. In other words, there is no reason to question the manner in which the Fifth Circuit analyzed the case. Even if had not considered *Reeves*, the Fifth Circuit's analysis and result are correct, which is an additional reason the case should not be remanded.

4. Even If the Court Wanted to Consider These Questions, This Would Not Be The Case To Do So.

There are a number of additional reasons why this case would not be an appropriate case to consider the questions the petitioner seeks to present.

1. This a religion case and in such cases the role of the court and jury are different from other Title VII cases, as outlined above.

2. The jury instructions here were peculiar. If the Fifth Circuit was right, for example, that the hospital did not have to keep Ms. Bruff in the EAP, then it was entitled to judgment even if there were some fact issue about the subsequent accommodation, and vice versa.

3. The record in this case is an ugly record, full of appeals to the potential religious prejudice of a jury against not only Jews, but against an "anonymous unknown lesbian."[6]

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[6] TT. In closing argument, petitioner's counsel said: "The hospital would have you think that an anonymous unknown lesbian patient has more rights than Sandy Bruff." TT 14:1397.

CONCLUSION

For these reasons, the Respondent hospital respectfully prays that this Court will deny the Petition for Writ of Certiorari.

Respectfully submitted,

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